Supreme Court, U.S.
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No. 85-1147

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RADIATION TECHNOLOGY, INC.,
Petitioner,

v.

NEUTRON PRODUCTS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

Did the United States District Court for the District of Maryland abuse its discretion or violate the petitioner's constitutional right to due process in connection with the imposition of sanctions based on findings that the petitioner had engaged in bad faith conduct before the court? *

Did the petitioner properly raise its procedural and due process arguments before the district court?

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* Pursuant to Supreme Court Rule 28.1, Neutron states that it has no parent companies, subsidiaries or affiliates.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	8
I. THE DISTRICT COURT AFFORDED THE PETITIONER DUE PROCESS BEFORE IMPOSING SANCTIONS	9
II. THE ISSUE OF DUE PROCESS WAS NOT RAISED BEFORE THE DISTRICT COURT	16
CONCLUSION	16

TABLE OF AUTHORITIES

CASES: Page

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 9
Hall v. Cole, 412 U.S. 1 (1973) 9
In the Matter of Los Angeles County Pioneer Society, 217 F.2d 190 (9th Cir. 1954) 8, 14-15
Jones v. Hildebrant, 432 U.S. 183 (1977) 16
McGowan v. Gillenwater, 429 F.2d 586 (4th Cir. 1970) 16
McLaughlin v. McPhail, 707 F.2d 800 (4th Cir. 1983) 13
Miranda v. Southern Pacific Transportation Co., 710 F.2d 516 (9th Cir. 1983) 13
Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980) 8, 12, 13
Societe Internationale v. Rogers, 357 U.S. 197 (1958) 12

STATUTES AND RULES:

FED. R. CIV. P. 11 9
FED. R. CIV. P. 54(b) 8
Title 28, Section 296 13

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STATEMENT OF THE CASE

Petitioner Radiation Technology, Inc. ("Radiation") and respondent Neutron Products, Inc. ("Neutron") are corporations involved in the commercial processing and use of cobalt-60, a radioactive isotope with a variety of applications in medicine and industry. The number of suppliers of cobalt-60 to corporations engaged in this business is limited; the United States Department of Energy ("DOE") is a major source. The dispute underlying this case arises out of an offer by DOE to sell three hundred eight "targets" containing cobalt-60, which had been produced as an intended by-product of the operation of DOE's nuclear reactors at its Savannah River labora-

tory. In order to be used in commercial irradiators of the type operated by Radiation and Neutron, the cobalt-60 in these targets has to be disassembled and then double encapsulated in stainless steel tubes to produce "sources." Neutron processes cobalt-60 and encapsulates it into sources for its own use and for sale to other licensed users, such as Radiation.

The DOE offer of these three hundred eight targets stated that the number of curies contained in them was calculated (without guarantee) to be 1,519,270 as of November 1, 1980.[1] Radiation and Neutron were the only bidders for these targets. In connection with the bid process, a dispute arose before the General Accounting Office concerning the award of the contract for their sale. This dispute was settled when Neutron and Radiation entered into a written Agreement, dated September 11, 1982, out of which this case ultimately arose.

Under the relevant terms of the Agreement, Neutron agreed to purchase the specified three hundred eight targets from DOE, and to manufacture and sell to Radiation double encapsulated cobalt-60 sources containing the same number of curies (± 10,000) received by Neutron from DOE, less an allowance of 3% for decay during processing. Radiation agreed to pay $0.55 for each curie in the double encapsulated sources actually delivered by Neutron to Radiation.

Each source delivered to Radiation was to contain between twelve thousand and twenty thousand curies. In the Agreement, Neutron warranted the integrity[2] of the sources for one year from the date of delivery. The Agreement also provided that, at no extra charge, in the course of one of Neutron's deliveries to Radiation's sub-

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[1] A "curie" is a measure of the degree of radioactivity of a radioisotope such as cobalt-60.

[2] A source containing cobalt-60 has "integrity" if it does not leak radioactivity.

sidiary located in Arkansas, Neutron would ship up to two hundred thousand curies of Radiation's previously owned sources free of charge from Arkansas to New Jersey, where Radiation's major facility is located.

After the Agreement was signed, Neutron undertook to perform. During its performance, it encountered a series of difficulties which had the effect of delaying its deliveries of sources to Radiation. The primary factor causing delay was the discovery by Neutron, just before shipments were to commence, of "micro-cracks" in the welds of the sources, which were visible under a 50X power microscope. After these micro-cracks were discovered, shipments were suspended pending the completion of an intensive investigation into their cause and into their effect, if any, on the integrity of the sources. Neutron had the sources analyzed by an independent engineering consulting firm, which concluded that the micro-cracks were inherent in the kind of stainless steel used to make the sources and that the micro-cracks would not propagate more than half way through the sources for two thousand years. With this assurance, all sources manufactured by Neutron, containing 1,088,900 curies, were delivered to Radiation by April 16, 1982.

On August 4, 1982, Radiation filed a complaint, verified by its president, Martin Welt, Ph.D., in the United States District Court of the District of Maryland. In that complaint, Radiation alleged under oath that Neutron breached the Agreement by (1) delivering 430,370 fewer curies than agreed; (2) delivering six sources, supposed to contain 72,000 curies, which did not meet the specifications in the contract and were therefore allegedly worthless; (3) violating the terms of the warranty by delivering sources made defective by the existence of the micro-cracks; (4) not delivering the cobalt-60 in accordance with the schedule in the Agreement; and (5) not delivering the other cobalt-60 sources from Radiation's Arkansas facility to its New Jersey facility

in a timely fashion. Radiation further alleged under oath that, because cobalt-60 was a rare commodity, unobtainable elsewhere, and because the purportedly defective sources were dangerous, it was entitled to preliminary and permanent injunctive relief. In addition to money damages, therefore, Radiation sought a mandatory injunction requiring Neutron to deliver, free of charge, an additional 502,370 curies (to replace those 72,000 curies which were allegedly worthless and to replace the alleged 430,370 curie shortfall) and requiring Neutron to re-encapsulate, again free of charge, all of the purportedly defective sources because of the radiological danger they allegedly posed to workers at the plant where they were used in Arkansas and to the people of that State.

Radiation filed a motion for preliminary injunction on August 18, 1982. It was initially based on the allegations of the complaint, verified by Dr. Welt, and subsequently supported by additional affidavits from Dr. Welt. This motion sought the injunctive relief requested in the verified complaint. Radiation delayed scheduling a hearing on its motion until January 21, 1983, five months after the complaint had been filed. The hearing was to be held before District Judge Norman P. Ramsey, to whom the case had been assigned.

If granted, the preliminary injunction motion would have cost Neutron hundreds of thousands of dollars. Neutron and its counsel therefore prepared extensive opposition memoranda and obtained affidavits from the individuals involved in the case, including officials of the Nuclear Regulatory Commission and the Arkansas Department of Health, consultants hired by Neutron, consultants allegedly hired by Radiation, and Neutron's president, Jackson A. Ransohoff, all at substantial expense. On January 18, 1983, the very day that Neutron hand-delivered its final set of opposition papers to counsel for Radiation, including the affidavits which revealed

that Dr. Welt had repeatedly made false and misleading statements under oath, Radiation abruptly withdrew its motion. In a letter to the district court, counsel for Radiation curiously volunteered that he had not read Neutron's papers before Radiation decided to abandon its motion.

Thus, despite Radiation's claims in its complaint, motion and supporting affidavits that the cobalt-60 which Neutron had delivered was encapsulated in sources which the State of Arkansas had determined to be defective and to represent an imminent radioactive "threat" to the "safety of individuals working in proximity to these faulty sources and a threat to the safety of the public," Radiation chose not to bring its motion on for a hearing before Judge Ramsey in January 1983. In fact, the motion was never renewed.

When Radiation's motion was withdrawn in January 1983, the action was approximately five months old, but no formal discovery had yet been taken. During the course of the next year, the parties undertook comprehensive discovery of each other. Among other things, Neutron deposed Dr. Welt concerning the claims he made in the verified complaint and the various affidavits he filed in court in connection with the abandoned preliminary injunction motion. Neutron also deposed the manager of Radiation's plant in Arkansas where the sources were delivered. During this period of discovery, it became clear to Neutron that the factual allegations made in Radiation's complaint and motion for preliminary injunction were not only false, but were known by Radiation, its president and its employees to be false at the time they were originally asserted.

In February 1984, Neutron filed a motion for summary judgment, seeking dismissal with prejudice of Radiation's complaint. Radiation filed a written opposition to that motion. In a letter dated April 18, 1984, the district judge to whom the case had been reassigned, Judge John

Hargrove, set the motion for hearing on May 30, 1984. Petitioner's Appendix ("Pet. App.") at J-1.

Thereafter, on May 4, 1984, Neutron filed a motion to recover costs and attorneys' fees because Radiation's claims which were made in support of its abandoned motion for preliminary injunction had been made in bad faith and in reckless disregard of the facts. Neutron sought to recover, *inter alia*, the substantial costs and attorneys' fees which it had expended in preparing to oppose Radiation's motion before it was withdrawn. In a letter from its counsel to the district court dated May 9, 1984, Neutron asked that this motion also be heard during the hearing previously scheduled for May 30, 1984. Pet. App. at K-1 through K-2.

In response to that motion, Radiation filed a twenty-four page written opposition on May 23, 1984. In a letter from its counsel to the court, however, it asked that the motion to recover costs and attorney's fees not be heard on May 30, 1984, for the sole reason that its counsel believed that the motion "require[d] separate, careful response. . . ." Pet. App. at L-1 through L-2. Counsel for Radiation did not indicate in that letter that Radiation demanded an evidentiary hearing on the motion, nor that it wanted to subpoena witnesses to testify in connection with the disposition of the motion, nor that its witnesses were unavailable on that day. Furthermore, at no time before the hearing did Radiation file a motion seeking to postpone it.

The hearing on both these motions was held on May 30, 1984, before the district court. Senior District Judge William P. Gray from the Central District of California, sitting by designation, heard the arguments of counsel on the record that day from approximately 9:35 a.m. until a recess before lunch, at which time he indicated that he wanted to be able to read the rest of record before he continued. Judge Gray specifically warned

counsel for Radiation that, if the claims made by Neutron in its motion were correct concerning Radiation's misrepresentations in its affidavits related to the safety of the cobalt sources because of the micro-cracks, "I am going to award attorneys' fees to the defendant on this." The court further indicated before the recess that "depending on how I rule on the issue of the warranty [the "micro-crack issue"], attorneys' fees will be awarded and I have to resolve a matter of the failure of the plaintiff to pursue its preliminary injunction. . . ."

The hearing resumed at aproximately 4:30 p.m., after the court had read the record fully. At no point during the hearing did Radiation's counsel ask that the ruling on this motion be postponed, nor did he ever seek the opportunity to have witnesses testify, to file further papers, or to engage in further discovery. Despite all of Radiation's arguments in its petition, it never raised any of these procedural claims before the district court.

At the end of the hearing, the district court concluded that there were no genuine issues of material fact and that Neutron was entitled to judgment as a matter of law on all five claims made by Radiation in its complaint. Three of those five claims also contained the allegations which formed the basis for Radiation's abandoned motion for preliminary injunction. In addition to finding that these three claims presented no genuinely disputed issues of material fact, the district court concluded that these claims were completely groundless and had been asserted either in bad faith or with such reckless disregard for the facts as to constitute bad faith. After a complete examination of the record before it and after counsel for Radiation was afforded the opportunity to be heard on the record, the district court granted Neutron's motion to recover costs and fees and awarded Neutron the sum of $26,500.00 in compensation

for the legal fees and expenses expended in opposing the motion for preliminary injunction. Thereafter, the district court entered detailed findings of fact concerning the motion to recover costs and fees and also conclusions of law pertaining to both motions.

These rulings were certified to the court of appeals pursuant to FED. R. CIV. P. 54(b). In a per curiam opinion dated August 26, 1985, the court of appeals affirmed the district court, rejecting all of Radiation's arguments.

REASONS FOR DENYING THE WRIT

This Court should deny the writ because it fails to present an important question of federal law which has not been previously considered and determined by this Court. The actions of the district court in its consideration of the motion to recover costs and attorneys' fees and the ruling thereon were fully consistent with the decision of this Court in *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980).

Radiation ignores this decision, and instead cites *In the Matter of Los Angeles County Pioneer Society*, 217 F.2d 190 (9th Cir. 1954), in an attempt to demonstrate that there is now a conflict between two courts of appeals concerning the procedures to be followed in connection with the imposition of sanctions. In fact, however, *In the Matter of Los Angeles County Pioneer Society* is so factually distinguishable as to be completely inapposite. There is thus no conflict between courts of appeals which needs to be resolved.

This Court should also deny the writ because the due process arguments now raised by Radiation were not raised in the district court.

I. THE DISTRICT COURT AFFORDED THE PETITIONER DUE PROCESS BEFORE IMPOSING SANCTIONS

The procedural abuses in which modern day litigants all too frequently engage are by now well known and well documented. When these abuses surface in the context of filing groundless motions and in the bad faith and vexatious conduct of litigation, the courts are provided with tools to deter and punish such conduct. In 1982, when the preliminary injunction motion was filed, pursued and abandoned, FED. R. CIV. P. 11 provided district courts with specific authority to restrain and punish such abuses. To make FED. R. CIV. P. 11 more effective, it was amended in 1983. When Neutron's motion to recover attorneys' fees and costs was filed, this rule provided that, when a motion is filed in a district court and is signed by an attorney, his signature constitutes a certificate that the motion, *inter alia*, "is well grounded in fact. . . ." If a motion is signed in violation of that rule, the court is further directed that it "shall impose upon the person who signed it, a represented party, or both, an appropriate sanction which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the . . . motion, . . . including a reasonable attorney's fee."

Long before FED. R. CIV. P. 11 was adopted, however, federal courts had the inherent power to assess attorneys' fees when a party to litigation acted in bad faith, vexatiously, wantonly or for oppressive reasons. *See, e.g., Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-259 (1975). As this Court has stated, " 'bad' faith may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation." *Hall v. Cole*, 412 U.S. 1, 15 (1973).

In this case, the district court encountered just such abuses. Radiation filed a motion for preliminary injunc-

tion, premised on the central claim that Neutron had delivered over one million curies of radioactive cobalt-60 to Radiation's subsidiary in Arkansas in containers which were so defective that they represented a radiological hazard to the workers in the plant and to the people of Arkansas, and that the government of the State of Arkansas had made such a determination. Radiation also alleged under oath that Neutron had delivered 430,370 curies too few to it, in violation of the terms of the Agreement, and that six sources, containing 72,000 curies, were worthless. Based on these claims, set forth in a verified complaint and several affidavits from Dr. Welt, the president of Radiation, Radiation sought a mandatory injunction directing Neutron to re-encapsulate all of the cobalt-60 already delivered and to deliver an additional half million curies of cobalt-60, all free of charge.

In fact, however, these claims were factually groundless and, as was shown by discovery obtained in the case after the motion was withdrawn, were known to be false by Radiation when they were made. In its verified complaint, Radiation alleged that, because of the existence of the micro-cracks, the State of Arkansas had "determined that such cracks pose a radioactive threat unacceptable to it." Radiation's president, despite his verification of the complaint, however, subsequently admitted in his deposition that he had "no idea" whether the State of Arkansas ever made a determination that the cobalt-60 sources presented any radiological threat. In a letter he wrote four months *before* he verified the complaint, Dr. Welt informed the State of Arkansas that, despite the micro-cracks, the sources had a "life expectancy of 2000 years." Also, in January 1983, in a letter to the State of Arkansas the manager of Radiation's plant in Arkansas, where the sources had been delivered, stated that "these sources do not represent a Radiological Safety Hazard."

The other claims made by Radiation in its preliminary injunction motion were also shown to be false. Radiation sought in its motion complete replacement of six allegedly worthless sources of cobalt-60. The manager of the Arkansas plant and the president of Radiation both admitted in their depositions, however, that these sources were accepted and used, and were not worthless. In its preliminary injunction motion, Radiation also sought the delivery to it, free of charge, of the alleged 430,370 curie shortfall for which it claimed it had already paid. The plain language of the Agreement showed that Radiation was not entitled to receive 430,370 curies more than it did, however. The undisputed facts also demonstrated that Radiation had only paid for the sources it actually received.

The issue brought before the district court on May 30, 1984, was not one of credibility of affiants but rather was one of admitted misrepresentations made in sworn pleadings and affidavits filed with the court. The record before the district court made it unmistakably clear that Radiation had made a series of factual allegations before the court which were false, fraudulent and groundless. At the close of the hearing, it was evident to the district court that Radiation's motion for preliminary injunction had been brought, if not in bad faith, with such a reckless disregard of the facts as to constitute bad faith. Radiation's claim that the cobalt-60 sources were defective and posed an imminent, unacceptable radioactive threat to the safety of the workers and the public was, the district court stated, "enough to scare a district judge" but for which there was "no justification, no basis in the record. . . ." Radiation now argues to this Court that the imposition of sanctions against it was done without the benefit of due process. Against this record, controlling precedent from this Court demonstrates that Radiation's claims are unfounded.

It is axiomatic that provisions of federal law concerning the imposition of procedural sanctions must be ap-

plied in light of the Fifth Amendment guarantees of due process. *See, Societe Internationale v. Rogers*, 357 U.S. 197, 208-212 (1958). Contrary to Radiation's arguments, however, due process does not require a plenary trial before attorneys' fees can be imposed as a sanction. What is required, as this Court has stated, is simply "fair notice and an opportunity for a hearing on the record." *Roadway Express, Inc. v. Piper, supra*, 447 U.S. at 767 (footnote omitted). This is precisely what Radiation received.

After Neutron filed a written motion and supporting memorandum, setting forth precisely the relief sought and the grounds therefore, Radiation filed a lengthy written memorandum in opposition to Neutron's motion to recover its attorneys' fees. Thereafter, a hearing was held before the district court, and Radiation's counsel appeared and argued.[3] The transcript of the hearing is eighty-five pages long. This Court's prior decisions require nothing more. The suggestion by Radiation that it was deprived of due process because Neutron's motion was not filed before the case was transferred from Judge Ramsey, the district judge assigned to the case when the preliminary injunction hearing was abandoned, is meritless. It is simply inaccurate to state, as Radiation does repeatedly in its petition, that only Judge Ramsey could hear this motion because he had already participated in the "preliminary injunction proceeding." As Radiation's petition makes clear, there was no such proceeding because Radiation withdrew its motion before a hearing was held. While it is improper to speculate concerning the familiarity which Judge Ramsey acquired with a motion in one case assigned to him which was never

[3] Radiation has claimed that it was given inadequate notice of this motion because Judge Hargrove's letter of April 18, 1984, to counsel setting the May 30, 1984, hearing fails to mention Neutron's motion to recover attorneys' fees. That letter could not possibly have mentioned Neutron's motion, because it was filed three weeks after the letter was written.

brought on for hearing, it certainly cannot be said that, once the case was assigned to a different judge, due process deprived Neutron of the right to file its motion. This is particularly true in light of the fact that it was during pretrial discovery, conducted after the motion was withdrawn, that Radiation's president and employee admitted that the sworn allegations made on behalf of Radiation were false. Additionally, Radiation's apparent claim that visiting senior judges such as Judge Gray cannot decide such motions is equally meritless and without colorable legal support. *See*, 28 U.S.C. § 296.

Radiation has further argued it was entitled to a complete evidentiary hearing, and that the entry by the district court of findings of fact is further proof that it should have held a trial, because such findings cannot be entered without one. This issue has been settled by this Court, as well. In *Roadway Express, Inc. v. Piper*, *supra*, the Court ruled that, before a district court can award sanctions based on its inherent powers, it needs to make specific findings on the issue of bad faith. 447 U.S. at 767. Nowhere did this Court even suggest that a trial had to be held before such a finding could be made, only that there be "fair notice and an opportunity for hearing on the record." *Id.* This is consistent with the procedure that has been followed in the courts of appeals. *See, e.g., Miranda v. Southern Pacific Transportation Co.*, 710 F.2d 516, 522-523 (9th Cir. 1983); *McLaughlin v. McPhail*, 707 F.2d 800, 806 n.10 (4th Cir. 1983).

To require a full trial before an award of sanctions can be made would undermine the efficacy of sanctions and effectively limit the ability of district courts to deal with litigation abuses. This need of trial courts to deal with sanction motions in an efficient but fair manner, and not to become ensnared in a trial within a trial, was emphasized by the Advisory Committee Note of 1983 to Amended FED. R. CIV. P. 11:

> To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record. Thus, discovery should be conducted only by leave of the court, and then only in extraordinary circumstances.

97 F.R.D. at 200-201. There is no valid reason to undermine the purpose of sanctions by imposing a requirement that a complete trial be held before monetary sanctions of this kind can be imposed.

The only argument advanced by Radiation which it supports with case authority is its claim that the Ninth Circuit's opinion in *In the Matter of Los Angeles County Pioneer Society, supra*, conflicts with the Fourth Circuit's opinion in this case, creating a conflict between the circuits which this Court should resolve. The facts of *Pioneer Society* are not even remotely similar to this case. In *Pioneer Society*, an attorney representing a creditor in a bankruptcy case sought a temporary restraining order, restraining the Superior Court of the Los Angeles County from taking action in a case pending before it. At a hearing four days later before the district court in the bankruptcy proceeding, the court set aside the restraining order and then summarily disbarred the attorney who originally sought the order. The court of appeals described the end of the hearing as follows:

> The first intimation the appellant had that the District Court was considering anything other than the setting aside of the restraining order came at the end of the session. Then after a finding by the court that appellant committed a fraud on the court by procuring the restraining order, and the reading of an order of disbarment, *already prepared by the court*, the record concludes:
>
> > "The Court: Mr. Clerk, here is the order, and you will enter it forthwith, immediately.

"The Clerk: Yes, your Honor.
"Mr. Lavine: If your Honor please, ——
"The Court: The court will adjourn."

217 F.2d at 191-192 (emphasis in original).

The facts of this case could not be more different. Radiation knew Neutron had filed a motion seeking to recover attorneys' fees as a sanction and asked that it be heard on May 30, 1984, had itself filed an extensive written memorandum in opposition to that motion, had been reminded by the district court twice, mid-hearing, that if the record was as Neutron claimed, attorneys' fees would be imposed, and had the opportunity, through counsel, for its hearing on the record.

The claim that the district court only considered the sanctions motion in an instant at the end of the hearing is erroneous and misleading. The basis for Neutron's motion was that the factual allegations made in support of Radiation's preliminary injunction motion were groundless and made in bad faith. These same factual allegations formed the basis for Radiation's case in chief, as well. Thus, in connection with Neutron's motion for summary judgment, these same facts were argued at length. The overlapping nature of the motions was explicitly recognized in the letter from counsel for Radiation to the district court in which he stated, "Although *Plaintiff views that the latest of Defendant's motions is a repetition of its Motion for Summary Judgment*, there are elements in it that are separate and apart from the Court's consideration of the summary judgment motion." (Emphasis added). Even a cursory review of the record reveals that Radiation's counsel was afforded a full opportunity to address whatever issues he deemed important, and that discussions of the central claim in Neutron's sanctions motion, the radiological safety and microcrack issue, consumed the great bulk of the hearing. In short, Radiation had ample opportunity to show that there were facts supporting its preliminary injunction motion

and failed to do so. Radiation's argument that it was deprived of due process on the basis of this record is frivolous.

II. THE ISSUE OF DUE PROCESS WAS NOT RAISED BEFORE THE DISTRICT COURT

It is well settled that a litigant cannot argue before the court of appeals an issue not raised before the district court. *See, McGowan v. Gillenwater*, 429 F.2d 586 (4th Cir. 1970). It is equally well settled that this Court will not review issues which the petitioner failed to raise below. *See, Jones v. Hildebrant*, 432 U.S. 183 (1977). Neutron acknowledges that Radiation raised its due process issue before the court of appeals, but one can search the record before the district court in vain to find any reference to Radiation's procedural claims. In fact, Radiation never argued until its brief to the court of appeals that its procedural rights had been violated, nor did it at any time even intimate to the district court that it desired that a different procedure be followed. Having been given the opportunity to make this claim in the district court, and having failed to do so, Radiation should be barred from raising it before this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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